IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1077

UNITED STATES OF AMERICA,

Petitioner,

v.

SECURITY NATIONAL BANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Opinion Below

The opinion of the Court of Appeals (Petition, Appendix A) is reported at 546 F.2d 492.

Statement

On September 5, 1975, respondent was indicted in the United States District Court for the Eastern District of New York and charged in nine counts with making illegal political contributions in violation of 18 U.S.C. §610. Three

of respondent's officers were also indicted. They were charged with conspiring to cause respondent to make the allegedly unlawful contributions, in violation of 18 U.S.C. §371; with causing respondent to make the contributions, in violation of 18 U.S.C. §610; and with conspiring to misapply bank funds, in violation of 18 U.S.C. §656. One officer was also indicted on two counts for allegedly making false statements in violation of 18 U.S.C. §1001.

At the trial, before a judge sitting with a jury, the government sought to prove that respondent made indirect contributions by raising the salaries of certain of its officers by $1700 per year and then directing the officers to make political contributions of $100 per month. The individual defendants defended against these charges on the ground that they acted in good faith reliance on the advice of respondent's counsel that the contributions program was legal.

Respondent defended on the ground that the officers were not merely conduits, but were free to use their salary increases as they saw fit without fear of reprisal. In support of this position, respondent elicited testimony which showed that several officers stopped making contributions and used the salary increases for their own purposes (A. 1019-1020, 1248-1249, 2772-2776);* that several officers considered the money to be their own (A. 1454, 1562, 1605, 1991, 2776-2779); and that several officers contributed only to political organizations which were politically acceptable to them (A. 373, 582, 958-959, 2774-2775). In addition, respondent contended that the contributions program was voluntary in nature (e.g., A. 1614, 1983, 2784-2785), no individual was forced to contribute, and no person who refused to participate was ever penalized in any way (A. 1247-1248, 1580-1581, 2785-2786). Finally, at respondent's request, the court charged the jury that it could not find respondent guilty if it concluded that the officers responsible for the contributions program were acting outside the scope of their authority (A. 2838-2840; BA 354-356).

* "A." refers to the appendix in the Court of Appeals; "BA" refers to the respondent's appendix in the Court of Appeals; "Pet." and "Pet. App." refer to the petition for a writ of certiorari and the appendices attached thereto.

In that portion of the charge to the jury which the government describes as "patently erroneous" (Pet. 6), the Court instructed that it was an essential element of the offense under section 610 "[t]hat the contribution charged in the specific count was actually made with bank funds" (A. 2825-2826). The government not only failed to object to this wording, but specifically requested the language now complained of. In its Requests to Charge, the government submitted a proposed instruction which stated: "Second, that bank money was used to make the political contribution or expenditure of money in connection with an election" (Government's Requests to Charge, Request No. 4; BA 357). Subsequently, in the colloquy during which the specific wording of the charge was debated, the defendants suggested that it read "actually made by the bank" (A. 2756-2757). The government replied, "[r]ather than by the bank, using bank funds as a much more accurate phrase" (A. 2757).*

* The government's statement that the instruction "amounted to a direction to the jury to acquit the defendants" (Pet. 5) is simply frivolous. The court also charged that "a contribution includes both direct and indirect payments" (A. 2826) and recapitulated the government's theory of the case, ". . . that the bank made the contributions indirectly by giving certain of its officers salary increases which

(footnote continued on next page)

The petition implies that the government filed its mid-trial petition for mandamus to correct the alleged error which it raised on appeal and renews here (Pet. 4). This is misleading. The ruling which prompted the mandamus petition related to the individual defendants rather than respondent, it did not involve the final charge to the jury (in which the government fully acquiesced in any event), and it was only partially based on the trial judge's view of the substantive elements required by Section 610*

The jury acquitted respondent on all counts.** The Court of Appeals dismissed the government's appeal as barred by the Double Jeopardy Clause.

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would then be used to make contributions on behalf of the bank" (A. 2826). In this connection, the court adverted to the government's contention that the officers of the bank were "merely conduits for the bank's money" (A. 2827). The single instruction on which the government focuses must be viewed in this overall context. *United States* v. *Park*, 421 U.S. 658, 674-675 (1975); *Cupp* v. *Naughton*, 414 U.S. 141, 146-147 (1973).

* In its petition for mandamus (A. 36-56), the government sought to compel the trial judge to charge the jury that the individual defendants could be convicted of a non-wilful misdemeanor violation of Section 610 even if their advice of counsel defense were accepted. The trial judge had refused to charge the elements of the misdemeanor violation for two reasons. First, he concluded that if the jury accepted the individual defendants' contention that they had relied on counsel's advice that the salary raises became the officer's property, then the jury would have to acquit them not only of the felony charge, but of a misdemeanor charge as well, since it could not be established that the defendants *knowingly* caused contributions of bank money (A. 2754). Second, he found that the timing of the government's request for the misdemeanor charge, which came several weeks after requests were to be filed and after the defendants had taken the stand and testified concerning their involvement in the contributions program, created extreme prejudice (A. 2755).

** The jury also acquitted two of the individual defendants on all counts. The third individual defendant was acquitted on all but one count, a violation of 18 U.S.C. §1001. His conviction on this count was subsequently set aside by the trial judge. *United States* v. *Clifford*, 75-CR-654 (E.D.N.Y. October 21, 1976).

Argument

In dismissing the government's appeal, the court below held that the Double Jeopardy Clause applies to corporations, and that when a defendant, whether an individual or a corporation, has been acquitted after a trial on the merits, "the double jeopardy clause of the Constitution precludes appeal by the government" (Pet. App. A, 2a-3a). This reading of the scope of the Clause is entirely consistent with and indeed mandated by this Court's decision in *Fong Foo* v. *United States*, 369 U.S. 141 (1962). Moreover, the unanimous decision of the Second Circuit here in issue is in complete accord with the view taken by every federal court which has considered double jeopardy claims raised by corporate defendants. Indeed, the decision recognizing the standing of the corporate defendant to invoke the protection of the Double Jeopardy Clause is compelled by the policy considerations underlying the Clause.

1. The Court of Appeals held that the applicability of the Double Jeopardy Clause to the corporate defendant was resolved by this Court in *Fong Foo* v. *United States*, *supra*. In *Fong Foo*, the Court held that the Double Jeopardy Clause was violated when the First Circuit vacated the trial court's mid-trial order acquitting the corporate defendant and two of its employees and ordered a new trial. The Court held that the verdict of acquittal was final and could not be reviewed on appeal without placing the defendants, corporate and individual, twice in jeopardy in violation of the Constitution. The government maintains that *Fong Foo* is not dispositive, arguing that the

decision cannot be considered an adjudication of the issue presented here since the issue was not explicitly presented, briefed or discussed (Pet. 16-18).

On the contrary, the issue was squarely presented for resolution in *Fong Foo*. The first question presented in the petition of the corporate defendant was "[w]hether the double jeopardy clause . . . bars a new trial of the defendant for the same alleged federal crime after a judgment of acquittal has been entered in the previous trial . . . ."* We submit that when a claim to constitutional protection is raised in this manner by a petitioner, his standing to assert the particular constitutional right in question is necessarily an issue before the Court. See *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 575 (1949); Sup. Ct. Rule 23(1)(c). Moreover, in *Fong Foo* the corporate petitioner explicitly argued that it was a "person" within the meaning of the Double Jeopardy Clause, stating that:

> "Petitioner corporation is a 'person' entitled to the Constitutional safeguard under the Fifth Amendment against being 'twice put in jeopardy.' *United States* v. *Glidden Co.*, 78 F.2d 639 (6th Cir. 1935; *United States* v. *United States Industrial Alcohol Co.*, 15 F. Supp. 784 (D.C. Md. 1936), *rev'd on other grounds*, 103 F.2d 97 (4th Cir. 1939). *See also United States* v. *M'Hie*, 194 Fed. 894, 898 (N.D. Ill. 1912). This is the only reasonable construction of the double jeopardy provision of the Fifth Amendment since its rationale 'that the State with all its resources and power should not be allowed to make repeated attempts

* Petition for a Writ of Certiorari at 2, *Standard Coil Products Co.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) (BA 303, 307).

> to convict,' *Green* v. *United States*, 355 U.S. 184, 187 (1957), or to impose successive punitive sanctions, is as applicable to a corporation as to an individual.'"*

The government's characterization of this statement as an oblique reference to the issue presented here (Pet. 17 n. 25) is puzzling. It is difficult to see how the corporate petitioner could have delineated more clearly its asserted eligibility for double jeopardy protection. In its Brief in *Fong Foo* the government, far from challenging the statement set forth above, conceded that the corporation had been placed in jeopardy.**

While we would not suggest that the government's decision to concede an issue before this Court forecloses that issue against the government forever, neither are we aware of any principle of constitutional adjudication which mechanically restricts the reach of a particular holding of this Court to those issues which the government, or any other litigant, in its discretion chooses to actively contest. When, as in *Fong Foo*, the disputed issue has been presented and briefed by the petitioner, conceded by the respondent, and necessarily decided as a predicate to a holding on the merits, the only logical view is that the issue has been decided.

In addition to the Court of Appeals in the decision below, the Fourth Circuit has read *Fong Foo* as holding that a corporation is entitled to double jeopardy protection.

* Brief for Standard Coil Products Co., Inc. at 52 n., *Standard Coil Products Co.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) (BA 310, 321).

** Brief for the United States at 46-47, *Standard Coil Products Co.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) (BA 334, 341-342).

United States v. *Southern Railway Corp.*, 485 F.2d 309, 312 (1973). See also *United States* v. *Armco Steel Corp.*, 252 F.Supp. 364, 368 (S.D. Cal. 1964). Moreover, when *Fong Foo* is read against a background of earlier decisions of this Court in which a corporate right to double jeopardy protection is assumed, see, *e.g.*, *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956), *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937), there is scant basis for the government's contention that the question presented here remains unresolved. Thus, it is hardly surprising that the government candidly concedes that as long as *Fong Foo* remains the last word on the subject, there is little prospect of a conflict arising among the circuits (Pet. 17-18).* Given the present state of the law, there is no need for this

* As the Court of Appeals observed in the decision below, "lower court decisions are in unanimous accord" (Pet. App. A, 3a) with the view that the established rules of double jeopardy protection do apply to the corporate defendant. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 534 F.2d 585 (5th Cir. 1976), *cert. granted*, Nov. 1, 1976 (No. 76-120); *United States* v. *Glidden Co.*, 78 F.2d 639 (6th Cir. 1935); *United States* v. *United States Gypsum Co.*, 404 F.Supp. 619 (D.D.C. 1975); *United States* v. *American Honda Motor Co.*, 273 F.Supp. 810 (N.D. Ill. 1967); *United States* v. *American Honda Motor Co.*, 271 F.Supp. 979 (N.D. Cal. 1967); *United States* v. *H.E. Koontz Creamery, Inc.*, 257 F.Supp. 295 (D. Md. 1966). In addition, a number of courts have assumed such protection in considering on the merits double jeopardy claims raised by corporations. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 485 F.2d 1143 (5th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *United States* v. *Wilshire Oil Co.*, 427 F.2d 969 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States* v. *American Oil Co.*, 296 F.Supp. 538 (D. N.J.), *cert. denied*, 396 U.S. 845 (1969). At least two state courts have held that a corporation is entitled to double jeopardy protection. *People* v. *Holbrook Transportation Corp.*, —— Misc.2d ——, 389 N.Y.S.2d 514 (App. Term, 1976); *City of Englewood* v. *Geo. M. Brewster & Son*, 77 N.J. Super. 248, 126 A.2d 120 (App. Div. 1962).

Court to amplify the rationale of a settled constitutional rule whose application presents no difficulty to the lower courts.

2. The government contends that since a conviction of a corporation can lead only to a fine, there is no meaningful distinction between a criminal prosecution of a corporation and a civil suit involving a corporation; "the difference between civil and criminal cases is primarily one of label—whatever the label, it is exposed to a money judgment but not to imprisonment" (Pet. 12). Hence, the government argues, it should be entitled to appeal jury verdicts of acquittal as though it were a party to a civil suit against a corporate defendant (Pet. 9). The Court of Appeals properly rejected this argument.

a. The central defect in the government's theory is that its premise is false; the nature of the penalty does not determine the applicability of the Double Jeopardy Clause. Although the Clause by its terms speaks of "jeopardy of life or limb," it is settled that it means something far broader than its literal language. *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). The Court has read the Clause as "written in terms of potential risk of trial and conviction, *not punishment.*" *Price* v. *Georgia*, 398 U.S. 323, 329 (1970) (emphasis supplied).

Criminal prosecutions within the coverage of the Clause are not limited to proceedings which may lead to a penalty of incarceration.* *United States* v. *La Franca*, 282 U.S.

* As the government notes (Pet. 13), the Court in *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975), stated that imprisonment and fines are intrinsically different for purposes of the Sixth Amendment jury

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568 (1931); *United States* v. *Chouteau,* 102 U.S. 603 (1880). See also *Robinson* v. *Neil,* 409 U.S. 505 (1973); *Ex Parte Lange,* 85 U.S. 163 (1873). The test of whether the Clause applies is not the nature of the penalty which may be imposed, whether upon an individual or corporation, but rather the character of the proceeding as remedial or criminal. *Helvering* v. *Mitchell,* 303 U.S. 391, 398-99 (1938). Thus, in actions which cannot lead to incarceration but only to economic sanctions, the Court has determined the applicability of the Clause in light of "the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 548-49 (1943).

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trial guarantee. However, the Court expressly declined to reach the argument proffered by the government that would have distinguished between individuals and corporations—"that there is no constitutional right to a jury trial in any criminal case where only a fine is imposed on a corporation or labor union." *Id.*

In any event, the government's reliance on the fine-imprisonment distinction drawn in *Muniz* and in *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972), another Sixth Amendment case, as bearing on the scope of the Double Jeopardy Clause, is simply misplaced. In *Breed* v. *Jones,* 421 U.S. 519, 528 n.10 (1975), the Court noted that "[dis]tinctions which in other contexts have proved determinative of the constitutional rights of those charged with offenses against public order have not similarly confined the protection of the Double Jeopardy Clause. Compare *Robinson* v. *Neil,* 409 U.S. 505 (1973), with *Baldwin* v. *New York,* 399 U.S. 66 (1970), and *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972)." The distinction between a fine and imprisonment bears on the right to jury trial under *Baldwin;* it bears on the right to counsel under *Argersinger.* That this distinction does not confine the protection of the Double Jeopardy Clause is manifest in *Robinson,* where the Court held that its decision in *Waller* v. *Florida,* 397 U.S. 387 (1970), barring separate state and municipal prosecutions for the same offense, applied retroactively in a case where the defendant was fined in a municipal court and later jailed upon a state conviction.

The government's argument that the Double Jeopardy Clause should not apply to a corporation because it is only subject to a fine is not only inconsistent with every decision of the Court noted above, it is also logically flawed. The identical argument that the government advances here could be made with respect to the prosecution of individuals under numerous federal criminal statutes which do not provide for a penalty of incarceration. See, *e.g.,* Title 18, United States Code, Sections 154, 243, 244, 288 (claims of less than $100), 291, 431, 432, 475, 489, 616, 1694, 1696(b), 1697 and 1698. We do not understand the government's position to be that it could appeal from a verdict acquitting an individual of a violation of one of these statutes. On the contrary, the government concedes, as it must, that the Double Jeopardy Clause bars a government appeal whenever a natural person is tried and acquitted (Pet. 5, 6, 7). Thus, at least in the case of individuals, the government implicitly concedes that the Double Jeopardy Clause applies to all criminal proceedings, regardless of the penalty which may be imposed.

Nowhere in its petition, however, does the government advance a single reason, much less a logical or compelling one, why the Clause protects an individual who is subject only to a fine, but should not apply to a similarly situated corporate defendant. Indeed, the entire thrust of the government's argument, that a corporation cannot be imprisoned and therefore does not require double jeopardy protection, begs this dispositive question rather than answers it. The government's inability to provide a satisfactory rationale in urging different treatment for similarly

situated corporate and individual defendants is, however, understandable. When the policies underlying the Double Jeopardy Clause are examined, it is evident that just as the application of the Clause does not turn on the nature of the potential penalty, neither does the scope of the Clause depend upon the character of the defendant.

b. One of the central purposes of the Clause is to protect a defendant against multiple prosecutions for the same offense.* *United States* v. *Wilson,* 420 U.S. 332, 343 (1975). This policy against multiple trials is so strong that exceptions to it have been only grudgingly allowed. *Id.* Hence the rule that the government may not appeal an acquittal when appellate review might subject the defendant to a second trial. *United States* v. *Jenkins,* 420 U.S. 358, 365 (1975); *Fong Foo* v. *United States,* 369 U.S. 141 (1962); *Kepner* v. *United States,* 195 U.S. 100 (1904); *United States* v. *Ball,* 163 U.S. 662 (1896).

* The Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce,* 395 U.S. 711, 717 (1969). Given the emphasis in two of these rules upon the prohibition against reprosecution, it is evident that the government reads the Clause far too narrowly when it states that the Clause "erects a safeguard against multiple convictions for the same crime" (Pet. 10). Moreover, the government's further statement that "[p]rinciples of *res judicata* do the same . . . [*i.e.* protect against multiple convictions for the same crime]" (Pet. 10), is simply false. Orthodox principles of *res judicata* and collateral estoppel do not come into play until after a final judgment and would not bar a second conviction for the same offense; indeed, such principles, to the extent applicable, would operate in a second prosecution following conviction to conclude *against* the defendant those issues actually litigated in the first trial. See *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 875 (1952); *cf. Emich Motors Corp.* v. *General Motors Corp.,* 340 U.S. 558, 568-69 (1951).

The rule against multiple trials furthers fundamental notions of fairness and finality. As Mr. Justice Black stated for the Court in *Green* v. *United States,* 355 U.S. 184, 187-188 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

These policies apply fully to the corporate defendant. The risk of prosecutorial abuse, in the form of repeated attempts to obtain a conviction, is precisely the same whether the defendant is a natural or a legal person.* This function of the Clause as a restraint upon unwarranted governmental action does not derive its purpose from the character of the defendant, but reflects a need to "lessen the danger of governmental tyranny." J. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* 15 (1969). See also *Gori* v. *United States,* 367 U.S. 364, 372 (1961) (dissenting opinion); Note, *Double Jeopardy and the Multiple-Count Indictment,* 57 Yale L.J. 132, 133 (1947). Hence the attachment of jeopardy when the jury is sworn, which "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinu-

* The government does not appear to suggest that the risk of prosecutorial abuse is present to a lesser degree where the defendant is a corporation than where the defendant is a natural person. Indeed, given the government's conduct in the trial below, it would be hard pressed to make such an argument. See Brief for Defendant-Appellee Security National Bank in the decision below at 33 n., 36 n.

ing the trial when it appears that the jury might not convict.'"* *Green* v. *United States,* 355 U.S. 184, 188 (1957). This important function of the Double Jeopardy Clause as a curb on prosecutorial abuse has continuing vitality in every prosecution, whether of an individual or a corporation. *United States* v. *Kessler,* 530 F.2d 1246 (5th Cir. 1976). See *United States* v. *Jorn,* 400 U.S. 470, 485-486 (1971); *Downum* v. *United States,* 372 U.S. 734, 736 (1963).

A second policy underlying the rule against multiple prosecutions is that the possibility of convicting an innocent defendant is thereby minimized. *Green* v. *United States, supra* at 187-188. Clearly this policy applies regardless of the character of the defendant and regardless of the penalty. The wrongful conviction of an innocent corporation, following repeated trials, would be no less reprehensible than the wrongful conviction of an individual defendant.**

The final set of considerations noted by Mr. Justice Black in *Green* v. *United States, supra,* concern the embar-

* Principles of *res judicata* and collateral estoppel would not protect a corporate defendant whose trial had been discontinued by the prosecution against a second trial for the same offense, since by definition there would be no final judgment determining any issue of ultimate fact. See *Ashe* v. *Swenson,* 397 U.S. 436, 443 (1970).

** Nowhere in its petition does the government suggest that the wrongful conviction of a corporation is not equally repugnant to our concept of justice. The government concedes that "[c]orporations doubtless would . . . suffer the enhanced possibilities of conviction associated with second trials" (Pet. 11), but argues that in this respect civil and criminal cases involving corporations are identical, and the government's right to appeal should not depend on the label attached. The short answer to this is that the same argument could be made with respect to individual defendants exposed only to a fine. The government does not (because it cannot) explain why the "label" should be disregarded in the case of corporations but not in the case of individuals.

rassment, expense, ordeal, anxiety and insecurity which would be suffered by a defendant exposed to the possibility of multiple prosecutions for the same offense. In its petition, the government contends that these concerns focus primarily on the potential exposure to imprisonment faced by an individual defendant (Pet. 13). However, since the application of the Double Jeopardy Clause concededly does not require a prospect of imprisonment in a proceeding against an individual, but only that the proceeding be criminal in nature, the government's view is too restrictive. We submit that the guarantee of finality embodied in the Clause serves the broader function of delimiting the ordeal, the expense and the opprobrium visited upon a defendant exposed to a verdict of criminal guilt, irrespective of the particular sanctions which may attend that verdict.

Denial of double jeopardy protection to the corporation would lead to adverse effects closely akin to those enumerated in *Green.* A charge of criminal wrongdoing can be as embarrassing and economically damaging to a corporation as to an individual. Indeed, a corporation charged with a crime must, like an individual, be concerned not only with the verdict of "the jury but [with] the verdict of the community as well." *Price* v. *Georgia,* 398 U.S. 323 at 331 n.10 (1970).* Moreover, the expense of defending repeated prosecutions and appeals would burden a corporation just as surely as it would an individual.

The government stresses that a corporation is "insensate and feel[s] no 'anxiety' or 'insecurity'" (Pet. 11).

* Other areas of the law recognize and protect a corporation's business reputation. For example, it is settled that a corporation may recover in an action for libel. See, *e.g., Maytag Co.* v. *Meadows Mfg. Co.,* 45 F.2d 299, 302 (7th Cir. 1930), *cert. denied,* 283 U.S. 843 (1931); W. L. Prosser, *The Law of Torts* 745 (4th ed. 1971).

The lower courts have not been so myopic. In several cases, courts have dismissed indictments against corporations on due process and double jeopardy grounds, specifically finding that multiple prosecutions by the government amounted to "harassment" of the corporate defendants. *United States* v. *United States Gypsum Co.*, 404 F.Supp. 619 (D.C. D.C. 1975); *United States* v. *American Honda Motor Co.*, 273 F.Supp. 810 (N.D. Ill. 1967); *United States* v. *American Honda Motor Co.*, 271 F.Supp. 979 (N.D. Cal. 1967). In the *Honda* cases, the courts stressed that multiple prosecutions require repeated responses to subpoenas and subpoenas *duces tecum* and that "this is precisely the sort of harassment which fundamental fairness and the due process clause prohibit." 273 F.Supp. at 820; see also 271 F.Supp. at 988. As the Court of Appeals noted below, the government, in contending that corporate crimes are merely regulatory violations punishable by fines, "seeks to avoid the concept of governmental harassment and oppression which is a basic ingredient of the resistance to double jeopardy" (Pet. App. A, 5a-6a).

Thus, the basic policies underlying the Double Jeopardy Clause's rule against multiple trials—the prevention of prosecutorial abuse, the avoidance of wrongful convictions, and the protection against expense, embarrassment and harassment—apply as fully when the defendant is a corporation as when the defendant is an individual. When the interests of the owners and managers of a corporate defendant, particularly the cost to the shareholders of defending repeated prosecutions and the embarrassment, expense, ordeal and insecurity suffered by managers, are taken into account, the applicability of these policies to

the prosecution of a corporation is obvious.* To strip a corporation of double jeopardy protection is to indirectly penalize these individuals for doing business in the corporate form. The government maintains, however, that their interests are irrelevant, for "[a] person seeking to do business as a corporation must take the bitter with the sweet" (Pet. 16). The government supports this argument by analogy to the rule that a corporation is not a "person" entitled to Fifth Amendment protection against self-incrimination, a rule which may indirectly have the effect of denying the privilege to an individual. This analogy is misconceived.

c. The rule that a corporation is not a "person" within the meaning of the Self-Incrimination Clause is not based on a theory that individuals forfeit basic constitutional rights by associating to do business in the corporate form. Rather, the rule stems from historical and practical considerations uniquely relevant to the state's investigatory function. As the Court explained in *Hale* v. *Henkel*, 201 U.S. 43, 74-75 (1906), the exclusion of the corporation from the Self-Incrimination Clause may be traced to the historic power of the state to investigate the affairs of corporations chartered by it. See also *Wilson* v. *United States*, 221 U.S. 361, 384-385 (1911). The modern day relevance of this doctrine of visitorial powers is that as a practical matter corporate records are generally not sufficiently confidential for the privilege to attach. See *Bellis* v. *United States*, 417

* The government does not, and could not, deny that the prosecution of a corporation impinges upon the individuals associated with it. Indeed, the rationale of prosecuting corporations is rooted in the deterrent effects of such prosecutions upon their owners and managers. See *United States* v. *A&P Trucking Co.*, 358 U.S. 121, 126 (1958); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1005-1006 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

U.S. 85, 92 (1974). Moreover, the exclusion of the corporation from the Self-Incrimination Clause has been justified as necessary to avoid setting a precedent with disturbing implications. In *Hale* v. *Henkel, supra,* the Court reasoned that if the agent of a corporation could assert the privilege on behalf of the corporation, it would logically follow that "[a] privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify . . . whether . . . [his] principal were an individual or a corporation." 201 U.S. at 70.

These factors are inapposite in the determination of a corporation's rights under the Double Jeopardy Clause. The historic power to investigate does not imply a power to reprosecute; the privacy element of the Self-Incrimination provision is absent in the Double Jeopardy Clause; and equal treatment of corporations and individuals for double jeopardy purposes hardly thwarts the efficacy of the criminal justice system, as might the recognition of a derivative self-incrimination privilege. Thus, the government's contention that since a corporation is not a "person" within the Self-Incrimination Clause, it is not a "person" within the Double Jeopardy Clause, is without merit.*

* If a corporation's rights under the Double Jeopardy Clause are to be analogized to its rights under another provision of the Fifth Amendment, the Due Process Clause provides a ready frame of reference. As early as 1889, the Court held that a corporation is protected against the deprivation of its property without due process of law. *Minneapolis & St. Louis Ry. Co.* v. *Beckwith,* 129 U.S. 26, 28. This rule recognizes the legitimate property interests of the shareholders of a corporation and extends due process protection to them by granting such protection to the corporation itself. *Railroad Tax Cases,* 13 F. 722, 746-747 (9th Cir. 1882). Since the conviction

(footnote continued on next page)

Moreover, the government's effort to characterize double jeopardy protection as "personal" in nature is severely undercut by the fact that the Court, commencing with the very case of *Hale* v. *Henkel,* has consistently held that a corporation enjoys Fourth Amendment protection against unreasonable searches and seizures. See *G. M. Leasing Corp.* v. *United States,* 97 S. Ct. 619, 629 (1977). If the protections of the Fourth Amendment are available to a corporation despite its artificial nature, there is no sound reason why double jeopardy protection is not equally appropriate. The protection against double jeopardy is no more "personal" than the "right of the people to be secure in their persons, houses, papers and effects," and both guarantees serve equally to restrain the state from overzealous conduct.

d. Our position that a corporation should enjoy the protections of the Double Jeopardy Clause is not undercut by the history of the Clause. We recognize that at common law a corporation was considered incapable of committing a criminal act, *New York Central and Hudson River Ry. Co.* v. *United States,* 212 U.S. 481, 492 (1909), and that as a consequence the application of the Clause to the corporate defendant was most likely not contemplated by the drafters of the Fifth Amendment. This fact, however, does not resolve the issue presented here. *Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 250, 307 (1819). Indeed, it would be quite anomalous if the modern rejection of

of a corporation involves, at the very least, a deprivation of its property through the imposition of a fine, the due process rights of a corporation and its shareholders, which embrace double jeopardy concerns, *Benton* v. *Maryland,* 395 U.S. 784, 794 (1969); see also *United States* v. *Wilkins,* 348 F.2d 844, 854 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966), should preclude such a deprivation from occurring in a manner violative of the Double Jeopardy Clause.

the "old and exploded doctrine that a corporation cannot commit a crime," *New York Central and Hudson River Ry. Co.* v. *United States, supra* at 496, created a new type of defendant which the government could prosecute unrestrained by historic safeguards such as those embodied in the Double Jeopardy Clause.

This Court has never accepted such a view. On the contrary, the Court has stated that "[i]n organizing itself as a collective body [a corporation] waives no constitutional immunities appropriate to such body." *Hale* v. *Henkel,* 201 U.S. 43, 76 (1906). In light of the policies underlying the Double Jeopardy Clause, it is abundantly clear that immunity against double jeopardy is appropriately extended to the corporation.

The government argues necessity in its favor. It claims that "many of these business regulatory statutes are complex and raise sophisticated legal issues in their application; judicial resolution of problems and uncertainties in the law is hindered by lack of access to appellate consideration of disputed questions" (Pet. 9).* All of this may be

* As is true of much of the government's argument, this statement could be made in support of appellate review of acquittals of individual defendants. Individuals, too, may be held criminally liable under the federal "regulatory" statutes cited by the government (Pet. 8 nn. 11 & 12), several of which provide for substantial penalties. See, *e.g.,* 15 U.S.C. (Supp. V) §§1, 2 (Sherman Act) ($~~50~~100,000 fine and/or ~~one~~ three year's imprisonment); 33 U.S.C. (Supp. V) §1319 (water pollution) ($25,000 fine per day and/or one year's imprisonment); 42 U.S.C. (Supp. V) §4910 (noise) ($25,000 fine per day and/or one year's imprisonment). The government understandably does not urge that appellate clarification is needed with respect to the application of these statutes to individuals. Yet, certainly the statutes do not become more complex simply because the defendant is a corporation. Thus, the logical fallacy of the government's argument is again patent here; the government simply does not explain why individual and corporate defendants should be treated *distinctively.*

true, but it is a novel jurisprudence that urges the complexity and sophistication of the criminal law as a reason why an acquitted defendant should endure a government appeal and the possibility of a second trial. If the law is so unfathomable that "identically situated corporations may receive different treatment, depending on the judge who tries the case" (Pet. 8-9), it hardly follows that the defendant should pay the price for overly complex statutes, or conflicting judicial interpretations of those statutes.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I, JOHN W. CASTLES 3d, a member of the Bar of the Supreme Court of the United States and one of the counsel for Respondent in the above-captioned matter, hereby certify that three (3) copies of this Brief for Respondent in Opposition have been served upon the Solicitor General, Department of Justice, by depositing the same in the United States Postal Office with postage prepaid, this 9th day of March, 1977, as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

All persons required to be served have been served.

JOHN W. CASTLES 3d